

WORKERS' COMPENSATION ADVISORY COUNCIL

**MINUTES ~ FEBRUARY 26, 1999 MEETING [10:00 A.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Steve Adams.

Voting members in attendance:

Mr. Bob Pitts
Mr. James G. Neeley
Mr. Jack Gatlin
Mr. Carter Witt [by proxy to Mr. Pitts]
Mr. Othal Smith, Jr. [by proxy to Mr. Neeley]

Nonvoting members in attendance:

Mr. Jerry Mayo
Ms. Jacqueline B. Dixon
Ms. Abbie Hudgens
Mr. Tony Farmer.

Ex officio members in attendance:

Mr. Michael E. Magill, Commissioner of Labor
Mr. Mark Brothers, Department of Commerce & Insurance
[designee for Commissioner Doug Sizemore]

Also present:

M. Linda Hughes, Executive Director

The minutes of the November 20, 1998, Workers' Compensation Advisory Council meeting were unanimously approved.

NEW BUSINESS

1. SECOND INJURY FUND

At the November 20, 1998 meeting, the staff of the Advisory Council was requested to prepare a list of obstacles to mediation of cases involving the Second Injury Fund and possible solutions. The Executive Director, Linda Hughes, was recognized by the Chair to present the report. Copies of the report had been mailed to the members.

Ms. Hughes noted the first obstacle was that suit must be filed against the Second Injury Fund in order to involve it in any claim. To resolve this problem, an amendment to the Second Injury Fund statute would be required to allow a party to involve the Fund without suit. One possible solution would be a procedure by which a notice would be required to be filed with the Fund. Staff had prepared a sample notice, patterned after notices required in other states, as a possible notice form which could be utilized. The formal Notice would require the party filing the notice to state the reasons why the Fund should have liability and to provide copies of documents supporting the claim against the Fund, including copies of all prior court orders awarding workers' compensation disability, medical records from prior physical disabilities, and medical records concerning the current injury. This information would give the Second Injury Fund the equivalent of a claims file from which the Fund could open a file and evaluate the claim. This would allow the Fund to participate in mediation without the necessity of a lawsuit.

A second obstacle is that Second Injury Fund attorneys have no settlement authority because, by statute, any settlement of a claim against the State requires the approval of the Attorney General, Comptroller and Governor. This process is burdensome and time consuming and makes it impossible for the Fund to participate in mediation. One possible solution would be to persuade the Attorney General, Comptroller and Governor to develop an internal procedure, which would not require a statutory amendment, to allow the Fund attorneys to file a recommendation for settlement and to be given a maximum amount of settlement authority for each file. This procedure would be easier to implement if the Second Injury Fund had received a Notice of Claim, accompanied by supporting documentation.

Mr. Neeley asked what the impact would be if the Fund attorneys had the authority to settle the claims. Ms. Hughes noted if the Fund attorneys had settlement authority at the time of mediation, they could negotiate depending on their evaluation of the case and this could shorten the time within which the employee and employer could receive the benefits of the Fund. Mr. Farmer stated if there was someone with authority to allow the Fund attorneys to negotiate that mediation would resolve probably 50-60% of the pending Second Injury Fund cases. The problem which currently exists is that these cases have to be tried because the Fund cannot settle. In his opinion, the employer is being hurt the most by this procedure because there are a lot of Second Injury Fund cases in which the injured worker's attorney would be happy to settle with the employer for less than the employer's

exposed liability and settle with the Fund for less than its exposed liability in order to decrease the employee's risk of proceeding to trial. An employee's attorney will reduce the potential liability/risk to the employer and Fund in order to reduce the employee's risk. Under the current system an injured worker's attorney does not discuss these cases with either the employer or the Fund. An additional problem which hurts the employer is the Fund takes the position if the employer settles for less than its full exposure, the Fund has no liability at all. This policy, in his opinion, costs the employer and the Fund a significant amount of money.

Mr. Adams stated his office has full settlement authority to settle workers' compensation cases filed by State employees and a maximum of \$25,000 settlement authority for tort claims. In his opinion the Department of Labor's personnel should be the ones to have the authority to settle claims against the Fund. He noted it may be necessary to have an established amount for the Department's authority and the other process could be followed for claims over that amount.

Mr. Neeley asked why there should there be a different system for settling State claims than for other workers' compensation claims. It was his opinion that if the Treasurer has authority to settle workers' compensation claims of the state's employees, why shouldn't the Department have the same authority to settle claims against the Fund. Mr. Farmer noted, as a practical matter, the higher the amount of settlement authority given to settle, the more claims which can be disposed of. Mr. Adams questioned whether someone should have the authority to settle a claim over \$300,000. Mr. Farmer said the present day value of a \$300,000 claim would be much less.

Another problem discussed was that, historically, the Fund does not pay claims in lump sum amounts. Mr. Farmer said the Claims Commission does pay claims in a lump sum. Mr. Adams said they do this because it helps to settle cases for less than they would cost otherwise. The Claims Commissions does, however, get concerned with large lump sum settlements. Mr. Mayo noted insurance companies are likewise concerned with large lump sum settlements, but he believed some resolution could be reached which could benefit both the employer and employee.

Commissioner Magill commented it was obvious from the discussion that the current system is not amenable to any party and, therefore, it would seem the Department should evaluate the appropriate steps which could be taken to resolve the problem. Mr. Adams suggested a meeting involving a representative from the Governor, Comptroller and Attorney General's offices to discuss the issue and available alternatives. Mr. Pitts favored this suggestion as so many have a role in the settlement process under existing state authority that the Advisory Council would be wasting its time discussing the problem unless those parties could be comfortable with such a process. Commissioner Magill volunteered to take responsibility to pull the appropriate parties together for a discussion of the issue and to report at the next meeting the progress of the discussions.

Later in the meeting, at the suggestion of Mr. Neeley, a subcommittee was appointed to study the Second Injury Fund issue. Members of the subcommittee are: Commissioner Magill, Jackie Dixon, Tony Farmer and Bob Pitts. The first meeting will occur after Commissioner Magill and Mr.

Adams have an opportunity to meet with the appropriate officials concerning the State's willingness to consider alternatives to the current settlement approval process.

2. REPORT OF SUBCOMMITTEE RE: SUBROGATION OF CASE MANAGEMENT COSTS

Ms. Hudgens reported the subcommittee had been formed to draft a proposed bill which would conform to the suggestions contained in the Attorney General's opinion regarding the initial draft of proposed case management subrogation legislation. She noted since the initial discussion of the issue of subrogation of case management costs in 1997, Mr. Farmer had been appointed to the Advisory Council. Subsequent to the formation of the subcommittee, both Mr. Farmer, who did not have an opportunity to participate in the initial discussion of the issue, and Ms. Dixon expressed reservations as to the appropriateness of the legislation. The subcommittee was, therefore, unable to reach a consensus concerning the issue. A written report of the subcommittee, including written comments from Mr. Farmer and Ms. Dixon, had been provided to the members of the Advisory Council prior to the meeting.

Ms. Hudgens, on behalf of employers, stated her opinion that in a "no-fault" system the employer should be able to recover these costs as the employers are required by law to incur the costs. In response to the inquiry by Mr. Adams as to whether case management is an effective tool to manage medical expenses, Ms. Hudgens stated she doubted her employer would be utilizing case management if not required to do so. Mr. Mayo noted case management is an effective way to manage costs and that it does reduce his company's costs. He indicated case management costs are a "case specific" cost and as an insurance company they wanted to be able to recover the costs from a liable third party.

Mr. Farmer expressed the opinion that this recovery would be at the expense of the employee as third parties seldom have sufficient insurance to cover all of the employee's damages and if this cost was added to the employer's subrogation rights, it would reduce the money available to the injured worker. Ms. Dixon was of the opinion that the subrogation of case management costs is not an appropriate use of the principle of subrogation because the rationale for allowing the employer to recover the medical expenses paid on behalf of the worker is to prevent the employee from receiving a double recovery - to prevent the employee from receiving the benefits from the employer and the same damages from the third party. In her opinion, the employee does not receive money or benefit from case management. Mr. Mayo did not agree the employee does not receive a benefit from case management. Ms. Hudgens noted in the majority of the cases, the employer is not able to recover the full amount of benefits paid to or on behalf of the employee from the third party.

As the subcommittee was unable to reach consensus, the report of the subcommittee was received by the Advisory Council and no further action was taken on the issue. Mr. Adams thanked the members of the subcommittee for their efforts.

3. REPORT OF EXECUTIVE DIRECTOR

Ms. Hughes reported to the Advisory Council that David Wilstermann had resigned as the Council's statistical analyst and she was advertising to fill the position.

Ms. Hughes requested and received the Advisory Council's approval to perform the 1998 trial study to conclude the final portion of the three year study of workers' compensation trials. She also distributed to the members a copy of a proposed Judicial Survey. Ms. Dixon suggested a better response might be obtained from the judges by addressing the judicial conference, which is set in April. Ms. Hughes indicated it was her intent to request the assistance of the Administrative Office of the Courts in collecting the surveys to assure anonymity of the respondents. The Advisory Council approved the survey to be done as Ms. Hughes' time allowed.

During the discussion of the Judicial Survey, Mr. Mayo inquired as to the status of the data collection utilizing the SD-1 form promulgated by the Department of Labor. Ms. Hughes indicated the SD-1 had been implemented, the parties were filing them and the Clerks were forwarding them to the Department of Labor. Commissioner Magill indicated the computer system should be completed by July 15, 1999. At that time, the Advisory Council staff hopes to have a link to the computer system in order to access the SD-1 data and go forward with the research programs of the Advisory Council.

Mr. Mayo asked whether the forms received by the Department were properly completed. Commissioner Magill responded that some questions and concerns have been raised about the form, but the forms are being received by the Department. Mr. Farmer reported clerks in some judicial districts are sending notices reminding attorneys the order is not final until the form is filed. In response to an inquiry by Mr. Pitts, Commissioner Magill stated the Department will have the responsibility to assure the forms are being properly completed and the Department has been discussing a combination of actions which may be necessary. Commissioner Magill stated he felt it appropriate for the Department to report to the Advisory Council concerning issues which arise concerning the form and how the Department intends to communicate to the public concerning the system.

A copy of the Quarterly Budget Report for the Advisory Council was made available to the members. Ms. Hughes reported expenditures are under budget.

4. ADDITIONAL ISSUES

Mr. Adams advised the Senate Commerce, Labor and Agriculture Committee had requested the Advisory Council to review and provide comment concerning all workers' compensation bills. He also reported the Advisory Council had received a request from an interested party for permission to address the Advisory Council concerning proposed legislation. Mr. Adams suggested any

interested party may submit their position on any particular piece of legislation to the Advisory Council in writing; that they are welcome to attend any meeting at which proposed legislation is being discussed, and if the Advisory Council needs additional information, it will ask for it at the meeting.

The next meeting of the Advisory Council was set for Friday, March 19, 1999 at 10:00 a.m. at which proposed workers' compensation legislation will be discussed. Staff will provide summaries of the bills to members by Monday, March 15, 1999.

The meeting was adjourned at 11:10 a.m.